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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JOSE TAMAYO REYES,

Petitioner-Appellant,

v.

J.C. KEENEY, Superintendent,
Oregon State Penitentiary,

Respondent-Appellee.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A FEDERAL HABEAS CORPUS PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING WHEN THE STATE RECORD REVEALS THAT CRITICAL FACTS WERE NOT ADDUCED IN THE STATE COURT BECAUSE HIS COUNSEL WAS INADEQUATE.

90-35315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JOSE TAMAYO-REYES,

Petitioner-Appellant,

v.

J.C. KEENEY, Superintendent,
Oregon State Penitentiary,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Mr. Tamayo-Reyes is a Cuban immigrant with virtually no education. He is unable to read, write or speak English. Mr. Tamayo-Reyes was charged with intentional murder after a fight in a tavern. Mr. Tamayo-Reyes eventually changed his plea from not guilty of murder to no contest to manslaughter. At that proceeding Mr. Tamayo-Reyes was represented by an attorney who utilized the services of a Spanish speaking interpreter. The plea form which was utilized was written in English. Although

the interpreter spoke Spanish, he was inexperienced as an interpreter. He did not translate every word. His method of interpreting was to just tell Mr. Tamayo-Reyes what was happening.

During the change of plea hearing, Mr. Tamayo-Reyes stated that he did not understand. When asked whether he chose to waive his rights and plead no contest, Mr. Tamayo-Reyes equivocated. An off the record discussion was held after which the interpreter responded, "okay."

Mr. Tamayo-Reyes subsequently challenged the validity of the plea. He has maintained throughout the state and federal proceedings that he did not understand the nature of the proceedings, or understood the nature of the charge which was being discussed or that he was pleading guilty or waiving a trial. In the state post-conviction proceedings counsel attempted to make a record of the inadequacy of the interpretation during the plea proceeding to establish that Mr. Tamayo-Reyes did not understand what was taking place. The magistrate, district court and the Ninth Circuit all acknowledged that the efforts of counsel in the state post-conviction proceeding to establish a record were "woefully inadequate (app-23)."[1] Judge Trott, after a thoughtful analysis, concluded that Mr. Tamayo-Reyes was entitled to an evidentiary hearing in order to prove his claims.

---

[1] "app" refers to the appendix to the state's petition.

ARGUMENT

The state's petition for a writ of certiorari should be denied for several reasons. First, the opinion of the court below is well-reasoned and properly resolved the issues. Second, the state urges this Court to ignore settled precedent on the rules applicable in determining whether a habeas corpus petitioner is entitled to an evidentiary hearing in federal court. The cases from this Court and the circuits which have addressed the issue are in agreement on the standards to be employed. Third, the state's analysis is flawed in several important respects.

A. The United States Court of Appeals for the Ninth Circuit properly resolved the issues in Mr. Tamayo-Reyes case regarding the right to a hearing on the question of whether the mens rea element of manslaughter in the first degree was properly explained to him.

The court below reached its conclusion that Mr. Tamayo-Reyes is entitled to a federal evidentiary hearing only after detailed and cogent analysis. The opinion carefully explored the law of habeas corpus before addressing the facts of Mr. Tamayo-Reyes' case. The result reached by the court is compelled by the facts of this case and precedent.

Mr. Tamayo-Reyes is an immigrant of limited education and no English skills. He was found guilty of manslaughter on a plea of nolo contendere. He never admitted his guilt. The proceedings which resulted in his conviction were interpreted for him by an individual who had limited experience in interpreting. The interpreter did not carry out his functions in a professional

manner; he did not translate directly for Mr. Tamayo-Reyes. Instead, he merely told him what was going on. The finding of guilty of manslaughter was entered after Mr. Tamayo-Reyes had denied guilt, stated that he did not understand, completed a form which included a request to consider the testimony of witnesses, and did not have the elements of manslaughter explained to him. See Henderson v. Morgan, 426 U.S. 637 (1976).

Mr. Tamayo-Reyes federal claims are the same as those presented in the state post conviction proceedings. In state court, the attorney assigned to represent him failed in his responsibilities to adequately develop the factual record in support of the claim. No expert witness was called. The interpreter was not asked how he had translated several critical terms; indeed, he was not even called as a witness. The defendant was not asked "any question relevant to the claim." Judge Trott carefully noted counsel's failings in the opinion below (app. 21-22).

The failings of counsel and inadequacy of the record in this case are indistinguishable from the failings which were held to require a federal evidentiary hearing in Townsend v. Sain, 372 U.S. 293 (1963).

B. The standard set out in Townsend for determining when an evidentiary hearing should be ordered in a federal habeas corpus action has not been changed.

The state argues that the Ninth circuit's holding regarding the Townsend standard is incorrect (pet. 9). The court below correctly stated the legal standard. In Townsend, the Court

adopted the "inexcusable neglect" standard set out in Fay v. Noia, 372 U.S. 391 (1963), for use in determining whether an evidentiary hearing should be ordered in a federal habeas corpus petition. The holding in Townsend remains sound.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court limited the situations in which the inexcusable neglect standard of Fay v. Noia was applicable. There the Court held the "cause and prejudice" test would be applied to determine whether a habeas petitioner's procedural default in state proceedings would be excused. Wainwright v. Sykes did not address the question presented in Townsend of the standard to be used to determine whether an evidentiary hearing should be held in federal court. The Court did, however, cite Townsend approvingly in discussing the duty of federal courts to hold hearings "notwithstanding the prior resolution of the issues in state court." Wainwright v. Sykes, 433 U.S., at 80.

The continuing validity of the Fay v. Noia standard in other contexts is reflected in several recent cases. In Ford v. Wainwright, 477 U.S. 399 (1986), the Court explicitly applied and relied on Townsend in holding that a federal evidentiary hearing was required. The same term, in Murray v. Carrier, 477 U.S. 478 (1986), the Court addressed, inter alia, the contention that it was inappropriate to employ the cause and prejudice test to procedural defaults which occur on appeal. The Court examined the applicability of the Fay v. Noia standard and held that, on the facts presented it would not be applicable. Murray v.

Carrier, 477 U.S., at 492. The Court expressed no opinion as to whether the Fay v. Noia standard might be applicable in a case in which no appeal at all was taken. More recently in McCleskey v. Zant, __U.S.__ 113 L.Ed.2d 517 (1991), the Court considered the standard applicable in considering when a successive habeas corpus petition should be permitted. The Court concluded that the abuse of the writ doctrine "implicates nearly identical concerns" as the doctrine of procedural default and that cause and prejudice must be shown before a successor petition should be permitted. In reaching that conclusion, the Court examined the various potential standards. The discussion reveals the continuing validity of Fay v. Noia in some contexts. There is no split in the circuits on the use of the Townsend and Fay v. Noia standards in the situations present in Mr. Tamayo-Reyes' case. See Yackle, 1 Post-Conviction Remedies Cumulative Supplement at 147-149 (1991); Liebman, Federal Habeas Corpus Practice and Procedure, Vol. 1, pp. 286-287 (1988).

C. The state's analysis is flawed in several important respects.

The analysis presented in the state's petition for a writ of certiorari is flawed in several important respects. At pages 7-9 of their petition, the state discusses principles of comity and raises concerns about proliferation of evidentiary hearings if the Townsend standard is applied. The state's argument ignores the fact that the Townsend standard has been followed throughout the country for more than two decades. There is no evidence that it has led to a proliferation of evidentiary hearings in habeas

it has led to a proliferation of evidentiary hearings in habeas corpus cases. To the contrary, all indications are that evidentiary hearings are the exception rather than the rule. See Liebman, supra, at 261 and sources cited therein. The state is asking the Court to change the law to address a "problem" that does not exist.

The state's argument misconstrues the nature of the writ of habeas corpus. Habeas proceedings are not appeals. They are, rather, intended to include evidentiary hearings. See, e.g., Ford v. Wainwright, supra 477 U.S., at 410; 28 U.S.C. 2243, 2254 (d); Rules 6-8 of the Rules Governing Section 2254 Cases in the United States District Courts.

Contrary to the state's argument, the Courts and Congress have given a great deal of deference to the states in structuring the habeas corpus remedy. No additional protection is needed in the form of a rule further limiting federal evidentiary hearings. The presumption of correctness incorporated in 28 U.S.C. 2254 (d) directly addresses significant federalism concerns. The statute strikes an appropriate balance between the interests of the states and the responsibilities of the federal courts in examining the constitutional validity of state convictions. When hearings are granted under the Townsend standard, the interests of the states are well protected.

The state's reference to Pennsylvania v. Finley, 481 U.S. 551 (1987), misapprehends its import. That case does not, as the state asserts (pet. 9), prohibit a federal petitioner from

asking a federal court to ignore state fact findings on collateral review because of counsel's negligence. To the extent that Finley deprives state post-conviction petitioners of counsel or effective counsel it renders federal habeas review even more important. The state's argument would severely undermine the right to collateral review.

In arguing that Wainwright v. Sykes rejected the inexcusable neglect standard (pet 9-11) the state confuses the different policy considerations underlying the doctrine of exhaustion of remedies and the right to a federal evidentiary hearing. Fay v. Noia dealt with the question of procedural default in the state courts. Wainwright v. Sykes rejected its standard only in that context. The requirement that a federal habeas petitioner avail himself of state procedures is designed to ensure that the interests of the states are protected and that the federal courts do not unduly intrude in state proceedings. In Wainwright v. Sykes the Court noted the critical distinction between the requirement that federal petitioners comply with state procedural rules and the right to have a hearing in federal court after such compliance.

> [I]t has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination on the merits of that claim reached in the state proceedings. This rule of Brown v. Allen is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure. (emphasis added).

Wainwright v. Sykes, 477 U.S., at 87. The state's analysis blurs this distinction.

Finally, the position advanced by the state would read subsection (3) out of 28 U.S.C. 2254 (d) and eliminate the fifth of the Townsend situations in which a federal hearing is required. Both the statute and Supreme Court precedent requires federal hearings when one of a number of circumstances exist, including a defective fact-finding procedure, failure of the state fact-finder to address the merits of a claim, lack of jurisdiction, or failure to provide counsel. These circumstances describe situations which would fit within the definitions of "cause" found in Murray v. Carrier, supra 477 U.S., at 488, "..an objective factor external to the defense.." The circumstance involving the failure to develop material facts addresses concerns which should remain distinct and not be permitted to be shown only when "external factors" are also present.

CONCLUSION

For all of the reasons set forth herein the states petition for a writ of certiorari should be denied.

DATED this June 27, 1991.

Steven T. Wax
Attorney for Petitioner-Appellant

90-35315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JOSE TAMAYO REYES,

Petitioner-Appellant,

v.

J.C. KEENEY, Superintendent,
Oregon State Penitentiary,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE AND MAILING

I, Steven T.Wax, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within Brief In Opposition on the counsel for the respondent by depositing in the United States Post Office at Portland, Oregon on June 27, 1991, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Virginia Linder, Solicitor General
400 State Office Building
Salem, OR 97310

Further, the original and one copy was mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street NE Washington, DC, 20543, for filing on June 27, 1991, with first-class postage prepaid.

DATED this June 27, 1991.

Steven T. Wax

Steven T.Wax
Attorney for Petitioner-Appellant

SUBSCRIBED AND SWORN TO before me this June 27, 1991.

stw\jtr\p1

OFFICIAL SEAL
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June 27, 1991

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The Honorable William K. Suter
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Re: Jose Tamayo Reyes v. J.C. Keeney

Dear Mr. Suter:

Enclosed for filing please find the original and one copy of petitioner's Brief in Opposition in the above-referenced case.

Thank you for your attention to this matter.

Sincerely,

Steven T. Wax
Federal Public Defender

STW:cm(supct.ltr)

Enclosure

cc: Virginia Linder, Solicitor General